



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 08 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 visa petition, the petitioner describes itself as a restaurant established in 2010. In order to employ the beneficiary in what it designates as a chef position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. Thereafter, counsel for the petitioner provided a response to the director's RFE. The director reviewed the information and determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Upon a preliminary review of the record of the proceeding, we issued a Notice of Derogatory Information (NDI). Counsel for the petitioner responded to the NDI.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation; (6) our NDI; and (7) counsel's response to the NDI with supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

II. SPECIALTY OCCUPATION

The issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

A. The Law

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989);

Matter of W-F-, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In ascertaining the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

B. Analysis

In a support letter dated March 18, 2013, the petitioner describes the duties of the proffered position as follows:

As a chef, he will be responsible to Supervise, activities of cooks and others in the kitchen engaged in preparing and cooking foods in Indian restaurant: Estimate food consumption and purchases foodstuffs. Receive and examine foodstuffs and supplies to ensure quality and quantity meet legal standards and specifications. Ensure that legally required levels of hygiene and cleanliness are maintained in the kitchen at all times. Select and develop recipes applying personal knowledge and experience in preparation of Indian food. Cooks and supervise personnel engaged in preparing, cooking and serving meats, Indian curries and [kabobs], vegetables, soups and other foods. Instruct workers as to size of portions and methods of garnishing. Employ, train, and discharges workers. Plan menus.

[Punctuation errors in the original].

We find that the petitioner has described the duties of the beneficiary's employment in the same general terms as those used by the *Dictionary of Occupational Titles (DOT)* for the occupational category "Chef." The wording of the above duties as provided by the petitioner for the proffered position are taken virtually verbatim from the tasks associated with the occupational category "Chef" from *DOT*.

Specifically *DOT* states, in pertinent part, the following regarding the occupational title "Chef (hotel & rest.)" – Code 313.131-014:

Supervises, coordinates, and participates in **activities of cooks and other kitchen personnel engaged in preparing and cooking foods** in hotel, restaurant, cafeteria, or other establishment: **Estimates food consumption**, and requisitions or **purchases foodstuffs**. **Receives and examines foodstuffs and supplies to ensure quality and quantity meet established standards and specifications**. **Selects and develops recipes** based on type of food to be prepared and **applying personal knowledge and experience in food preparation**. **Supervises personnel engaged in preparing, cooking, and serving meats, sauces, vegetables, soups, and other foods**. Cooks or otherwise prepares food according to recipe [COOK (hotel & rest.) 313.361-014]. Cuts, trims, and bones meats and poultry for cooking. Portions cooked foods, or **gives instructions to workers as to size of portions and methods of garnishing**. Carves meats. May **employ, train, and discharge workers**. May maintain time and payroll records. May **plan menus**.

(Emphasis added.) *Dictionary of Occupational Titles*, Occupational Information Network (O*NET), Chef (hotel & rest.) – Code 313.131-014, on the Internet at <http://www.occupationalinfo.org/31/313131014.html> (last visited October 8, 2014).

This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific H-1B employment.

The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

Nevertheless, we will now address in detail the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Turning to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), we will first discuss the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

USCIS recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² In the Labor Condition Application (LCA), the petitioner states that the proffered position corresponds to the occupational classification "Chefs and Head Cooks" - SOC (ONET/OES) code 35-1011, at a Level I (entry level) wage.³

² All references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. Excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

³ The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only

We reviewed the chapter of the *Handbook* entitled "Chefs and Head Cooks," and note that the subchapter of the *Handbook* entitled "How to Become a Chef or Head Cook" states, in part, the following about this occupation:

Most chefs and head cooks learn their skills through work experience. Others receive training at a community college, technical school, culinary arts school, or a 4-year college. A small number learn through apprenticeship programs or in the armed forces.

Education and Training

A growing number of chefs and head cooks receive formal training at community colleges, technical schools, culinary arts schools, and 4-year colleges.

Students in culinary programs spend most of their time in kitchens practicing their cooking skills. Programs cover all aspects of kitchen work, including menu planning, food sanitation procedures, and purchasing and inventory methods. Most training programs also require students to gain experience in a commercial kitchen through an internship or apprenticeship program.

Work Experience in a Related Occupation

Most chefs and head cooks start working in other positions, such as line cooks, learning cooking skills from the chefs they work for. Many spend years working in kitchens before learning enough to get promoted to chef or head cook positions.

Training

Some chefs and head cooks train on the job, where they learn the same skills as in a formal education program. Some train in mentorship programs, where they work under the direction of an experienced chef. Executive chefs, head cooks, and sous chefs who work in fine-dining restaurants often have many years of training and experience.

Some chefs and head cooks learn through apprenticeship programs sponsored by professional culinary institutes, industry associations, and trade unions in

a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

coordination with the U.S. Department of Labor. Apprenticeship programs generally last about 2 years and combine instructions and on-the-job training. Apprentices must complete at least 1,000 hours of both instructions and paid on-the-job training.

Courses typically cover food sanitation and safety, basic knife skills, and equipment operation. Apprentices spend the rest of the training learning practical skills in a commercial kitchen under a chef's supervision.

The American Culinary Federation accredits more than 200 academic training programs at post-secondary schools and sponsors apprenticeships around the country. The basic qualifications to enter an apprenticeship program are as follows:

- Minimum age of 17
- High school education or equivalent
- Drug free

Some chefs and head cooks receive formal training in the armed forces or from individual hotel or restaurant

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Chefs and Head Cooks, available on the Internet at <http://www.bls.gov/ooh/food-preparation-and-serving/chefs-and-head-cooks.htm#tab-4> (last visited October 8, 2014).

When reviewing the *Handbook*, we must note that the petitioner designated the proffered position under this occupational category at a Level I on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant U.S. Department of Labor (DOL) explanatory information on wage levels, the beneficiary will be closely supervised and his work closely monitored and reviewed for accuracy. Furthermore, he will receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation is appropriate for a research fellow, a worker in training, or an internship. This designation suggests that the beneficiary will not serve in a high-level or leadership position relative to others within the occupational category.

The *Handbook* indicates that most chefs and head cooks learn their skills through work experience. The *Handbook* reports that "[o]thers receive training at a community college, technical school, culinary arts school, or a 4-year college." While it states that a "growing number of chefs receive formal training at community colleges, technical schools, culinary arts schools, and 4 year colleges," it does not state that a bachelor's degree is required for the entry into the position. Further, the *Handbook* indicates that some chefs and head cooks learn through apprentice programs, which generally last about 2 years, and combine instructions and on-the-job training. Upon review, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty (or its equivalent) is normally the minimum requirement for entry.

Further, we note that the petitioner did not indicate educational requirements for the proffered position in its support letter. However, in response to the RFE, counsel submitted an advisory opinion from [REDACTED]. We reviewed the opinion letter in its entirety. However, as discussed below, the report is not persuasive in establishing the proffered position as a specialty occupation position.⁴

Mr. [REDACTED] provides a summary of his qualifications, including his educational credentials and professional experience. Based upon a complete review of Mr. [REDACTED] report, however, he has failed to provide sufficient information regarding the basis of his expertise on this particular issue. The documentation does not establish his expertise pertinent to assessing the minimum requirements for entry into the proffered position. Without further clarification, it is not apparent how his education, training, skills or experience would translate to expertise or specialized knowledge regarding educational requirements for the proffered position.

Mr. [REDACTED] asserts that he is qualified to comment on the position of Chef because he is an associate professor in the hospitality and service management department at [REDACTED] and has more than thirty-seven years of professional experience in the field of hospitality management, culinary Arts, and closely related fields. However, Mr. [REDACTED] letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. He claims to be qualified in the fields of hospitality management, culinary arts and related fields, but he did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here.

In the report, Mr. [REDACTED] asserts that "the position of Chef requires that the candidate have specialized knowledge through advanced post-secondary educational programs or through progressively responsible work experience in the field of Hospitality Management, Culinary Arts, or a closely related field." It is noted that Mr. [REDACTED] provided a brief description of the petitioner's business and a job description for the proffered position, which appears to be a copy of the petitioner's job description. However, as discussed, the job description provided by the petitioner is verbatim from the occupational category of "Chef" from DOT, and fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations.

Upon review of Mr. [REDACTED] opinion report, there is no indication that he possesses any knowledge of the petitioner's proffered position beyond this information. He does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply re-stated the generic

⁴ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

description of duties verbatim from DOT, and then claims that the appropriate knowledge required for these job duties would be a bachelor's degree in Hospitality Management, Culinary Arts or a closely related field. He does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. For instance, there is no evidence that Mr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Mr. [REDACTED] opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue.

Importantly, his statements are not supported by copies or citations of research material that may have been used. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

In summary, for the reasons discussed above, we conclude that the opinion letter rendered by Mr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Mr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. Therefore, we decline to defer to Mr. [REDACTED] findings and ultimate conclusions, and further find that his opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of the appeal, counsel submitted an article entitled "Education & Training Required for an Executive Chef." The article states "[t]here is a large body of knowledge required by professional cooks," which "can be acquired through training programs at a college or culinary school, or on the job through a formal apprenticeship or informal mentoring." The education and training requirements for a chef position mirrors the discussion in the *Handbook*, the document does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is the minimum education required for entry into the occupation. Instead, it states that the knowledge could be acquired on the job through a formal apprenticeship or informal mentoring.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other independent, authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the

minimum requirement for entry. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals." Thus, based upon a complete review of the record of proceeding, we find that the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted documents relating to its operations such as customer reviews from www.yelp.com and www.tripadvisor.com, and its menu. On appeal, in response to our RFE, the petitioner submitted additional documents regarding its business including financial documents, business licenses, and proposed leases for another location.

While the petitioner submitted documents regarding its business operations, the petitioner did not explain how the documents relate to the beneficiary's duties, and the submitted evidence does not establish the relative complexity or uniqueness of the proffered position. On appeal, counsel asserts that the proffered position is an executive chef/manager, which is like "an orchestra conductor or maestro." Counsel asserts that the beneficiary "must coordinate all of the sections of the restaurant from the front end of the house, i.e. the wait staff to the kitchen personnel to [ensure] that all the various areas of operations within the restaurant work in harmony." Further, the petitioner claims it plans to open a new restaurant and would not be able to simultaneously manage two restaurants and

supervise two kitchens. Counsel claims that the beneficiary will be "second-in-command charged with running the kitchen, as well as, running the business side of the restaurant."

However, we incorporate by reference and reiterate our earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the Level I wage rate, the beneficiary is only required to have a basic understanding of the occupation. Further, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; his work will be closely supervised and monitored; he will receive specific instructions on required tasks and expected results; and his work will be reviewed for accuracy.

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁵ The evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty is not required for the proffered position.

Upon review, we find that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them.

The petitioner has indicated that the beneficiary had "ample experience with Indian food and understands the importance of the little spices that make the difference between the merely good and the extraordinary." However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner has not established which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

⁵ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the RFE, counsel claimed that its signatory, [REDACTED] has been its own chef since opening the restaurant. However, counsel did not submit documentation relating to Mr. [REDACTED] credentials. Further, the record of proceeding does not contain the job duties and day-to-day responsibilities of Mr. [REDACTED] position. For instance, the petitioner did not submit evidence regarding the complexity of the job duties, supervisory duties (if any), independent judgment

required or the amount of supervision received. Accordingly, it is unclear whether Mr. [REDACTED] duties and responsibilities are the same as the proffered position.

The petitioner stated in the Form I-129 petition that it has 8 employees and that it was established in 2010 (approximately four years prior to the H-1B submission). The petitioner did not provide the total number of people it has employed to serve in the proffered position. Consequently, it cannot be determined how representative the petitioner's claim regarding one individual over a four-year period is of the petitioner's normal recruiting and hiring practices. Upon review of the record, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The petitioner and counsel claim that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We reviewed the petitioner's statements regarding its business operations. However, upon review of the entire record of proceeding we find that the submitted documentation fails to support the assertion that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." The petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied.

III. BEYOND THE DECISION OF THE DIRECTOR

Corporate Status

Beyond the decision of the director, we note that the record of proceeding in the instant case does not establish that the petitioner was a corporation in good standing in the State of Virginia at the time of filing the petition.

In our NDI, we noted that the website of the Virginia State Corporation Commission indicates that the petitioner's "status" is "canceled." The petitioner was reminded that the regulation at 8 C.F.R. § 214.2(h)(11)(ii) addresses the grounds for automatic revocation of the approval of a petition and states, in pertinent part, that the "approval of any petition is immediately and automatically revoked if the petitioner goes out of business." It logically flows that a petitioner must be doing and continue to do business for the director to grant the petition. If the petitioner were not in business and the director granted the petition, it would result in the approved petition immediately and automatically being revoked the instant it was approved. *See* 8 C.F.R. § 214.2(h)(11)(ii).

In response to our NDI, the petitioner submitted the following:

- The petitioner's bank statements from March 31, 2013 to July 31, 2014;
- County meal tax receipts from April 2013 to present;
- Virginia State Sales and use Tax Returns from June 2013 to present;
- Lease proposals;
- Liquor license;
- Table cloth and napkin invoices;
- Payroll reports from January 2013 to August 2014; and
- An undated printout from SCC that the corporation is active.

Upon review, we find that while the petitioner currently appears to be in business, the petitioner did not establish that it was a business in good standing as of the date of filing this petition. We note that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Accordingly, the record contains insufficient evidence to establish that the petitioner's business was in good standing at the time of filing the instant petition.

IV. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.